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In the Supreme Court of the United States.

OCTOBER TERM, 1927

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No. 15, ORIGINAL

THE STATE OF COLORADO,

Complainant,

vs.

THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION, A CORPORATION,

Defendants.

REPLY OF STATE OF COLORADO TO THAT PART OF "SEPARATE ANSWER OF THE STATE OF KANSAS" PRAYING AFFIRMATIVE RELIEF

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I

The State of Colorado, a State of the Union, by leave of Court files this, its Reply to that part of the "Separate Answer of the State of Kansas," namely, Paragraph Twenty-second thereof, which prays affirmative relief, and answering the same, respectfully sets forth:

(a) Complainant denies all the allegations of paragraph "a" except that it admits that the course of the Arkansas River across the State of Kansas is substantially as alleged, but if the distance measured along the river is

370 miles (instead of approximately 200 miles, as alleged by the State of Colorado in the Bill of Complaint herein, as compared to a course upon the main river of a distance of 300 miles within the State of Colorado), then upon a similar method of measurement along all the sinuosities of the thread of the stream, the course of the river in Colorado would vastly exceed 370 miles, and if only the chief tributaries in Colorado be included, the total course of the stream would exceed the course in Kansas on the same basis many times. Denies that the average annual rainfall is, for the first 190 miles along the course of the river in western Kansas, insufficient to raise crops without irrigation, but alleges that, for a distance of not to exceed 100 miles from the western boundary of Kansas, while the average annual rainfall (from 16 to 26 inches per annum) is sufficient to raise crops without irrigation, there are years in which irrigation is and has been beneficially employed on account of shortage in precipitation. Colorado denies that the soil in western Kansas would be characterized as "porous," but alleges that it is a reasonably impervious combination of fine sand and clay, through which water percolates at moderate speed, but the river bed itself in this western area is wide and sandy and even before settlement by man was often entirely dry, and the river was practically discontinuous except during spring and occasional summer floods. Colorado denies that any use or diversion of waters within the State of Colorado has in any respect or in any appreciable degree reduced the quantity of percolating water in the valley of the Arkansas River in Kansas or lowered the water table, but alleges that if the water table has been in any respect lowered or affected, such conditions existed prior to the date of the filing of the Bill of Complaint in the cause of *Kansas vs. Colorado* in the year 1901 and prior to the date as of which the issues and adjudication therein were made, and alleges that since said adjudication the quantity and flow of percolating waters in the State of Kansas, in the bed of

the Arkansas River, have been materially increased as a consequence of the employment of water for irrigation and other uses in Colorado.

(b) As to whether the State of Kansas owns the particular tracts alleged for use in connection with the Soldiers' Home and the Industrial Reformatory near the Arkansas River in Kansas, the State of Colorado is without knowledge, but admits that the State of Kansas may own properties within the valley of the Arkansas River, but alleges that if so, they are east of the area in which irrigation has been, now is, or can be beneficially employed, and in an area of plentiful water supply and that material use of river-water has never been necessary or attempted or even convenient upon or connected with such property, and alleges that there is not and never has been any depletion of flow in the Arkansas River through the acts of Colorado and its citizens which has affected or could have affected the said State property, its use, value or employment for agricultural or other purposes.

(c) Admits the allegations of paragraph "c", except that complainant denies that the acts of the State of Colorado and its citizens, or any use or diversion of water within the State of Colorado, has in any respect decreased or materially or deleteriously affected the population, municipal corporations, water supply, or revenue of the State of Kansas, and particularly denies that the same have been so affected since the adjudication in the said State of *Kansas vs. Colorado*, and alleges that while the revenues of the State of Kansas are relatively less in its western than its eastern counties, the said condition is true throughout all western counties and not only those traversed by the Arkansas River, and the condition is the result wholly of factors other than the flow of the river or any use of the river within either state.

(d) Admits the allegations of paragraph "d" which recite early irrigation developments in the valley of the

Arkansas River in western Kansas, but denies that the said irrigation development was, to any material extent, on a sound economic basis; alleges that irrigation has not been a permanent or continuous resource for agriculture within the State of Kansas at any time, and alleges that the development of agriculture under irrigation in Kansas reached its crest prior to 1895, but since the adjudication in the case of *Kansas vs. Colorado* irrigation in Kansas from the Arkansas River has been enlarged, and is on a more prosperous basis and irrigation is now at a better and more productive stage than at any time since 1900 and there is available a better supply of water therefor.

(e) Admits the construction and existence, prior to 1901, of the Frontier Ditch, the Alamo Ditch, the Ft. Aubrey Ditch, the Amazon Ditch, the South Side Ditch, the Great Eastern Ditch, the Finney County Ditch and the Garden City Ditch, and the South Side Ditch, but alleges that none of the other ditches or diversion systems or structures mentioned in said paragraph ever reached completion or actually operated or diverted water in any real or substantial extent. As to the dates as to which any or all said ditches were commenced plaintiff has no information but alleges that all were constructed prior to 1901, if at all. Alleges that there has never been, in any one year, to exceed the present acreage of land in the Arkansas basin in Kansas upon which water was applied, that there were not to exceed about 10,000 acres under irrigation at the time of the adjudication in *Kansas vs. Colorado*, within the State of Kansas, and that upon much of this, water has been applied only occasionally in seasons of low rainfall, and admits that as a consequence of the fact that river flow conditions are now better, irrigation is increasing, and the acreage under partial irrigation in Kansas may equal 70,000 acres or more.

(f) Denies all the allegations of paragraph "f" except that complainant admits that there was, prior to the year

1901, an increase in the quantity of water diverted and used from the Arkansas River in the State of Colorado, but denies that there has been any increase in the quantity of water used and diverted within the State of Colorado since the year 1901, but on the contrary alleges that the diversion and use of water in Colorado since said date has not increased in quantity or volume; alleges that the quantity and character of the supply of water in the Arkansas River at and east of the boundary line between Colorado and Kansas has been steadily improved since 1901, by reason of stabilization in the flow, return waters and percolating waters and other conditions brought about by the permanence and scientific character of irrigation and agriculture in Colorado, and the total quantity flowing into Kansas each year is increasing and exceeds the amount at any time required for beneficial purposes in Kansas.

(g) Denies all the allegations of paragraph "g" except that complainant admits that at all times since the beginning of irrigation in Colorado, the use and beneficial application of water in Colorado has been made with the permission of, to some extent with the aid of, and under the authority of the State of Colorado, but denies that, at any time, such use and diversion of water in Colorado has injured the State of Kansas, its citizens, residents or water users, or in any respect infringed the right of the State of Kansas, its citizens, residents or water users. Complainant denies that any citizen or resident of Kansas has any prior right, or any right by appropriation at all or any right to the use of water against the State of Colorado or any citizen, resident, inhabitant or corporation using, claiming or about to use or claim any water from the Arkansas River or its tributaries within the State of Colorado and denies that the irrigation enterprises now existing in Kansas are, by construction or priority in time or on any account or theory senior in claim to any use of water in Colorado.

(h) Admits the allegations respecting the general course of the suit in the Supreme Court of the United States known as *Kansas vs. Colorado*, admits the dates recited, but denies that the said proceeding was not a general adjudication of all the rights of the State of Kansas and its citizens, inhabitants and residents, as against all of the rights of the State of Colorado, its citizens, inhabitants and residents, and alleges that the contrary is the the case, and that said litigation had the effect and result heretofore pleaded and set forth by the State of Colorado in its original Bill of Complaint herein. Denies that the said Bill of Complaint in *Kansas vs. Colorado* was dismissed without prejudice, but alleges that the said cause was a final adjudication of the relative claims of the two states, and of all citizens, inhabitants, claimants, corporations, residents and other persons or individuals using water within the respective states, to the date and as of the date of the closing of testimony in the said adjudication, and alleges that no questions of law or fact remained undetermined in the said cause, except such as might arise from events subsequent to the closing of testimony in the said cause.

(i) Denies all the allegations of paragraph "i" and more especially denies that this pending case includes or can include any questions as to the rights of individuals in Colorado or Kansas, as such respectively, and denies that there are any such individual rights entitled to recognition, except by their respective sovereignties and within their own state, and alleges that there can be no issue in this cause except the relative rights of the two sovereignties, the State of Colorado and the State of Kansas, to the benefits of the waters of the Arkansas River, from and after the date of the closing of testimony in the case of *Kansas vs. Colorado*, to wit, on or about June 16, 1905, and then only to the extent that such questions are affected by events subsequent to the said date.

(j) Denies all the allegations in paragraph "j" and

particularly all those respecting increased use or diversions in the State of Colorado, and alleges on the contrary that the total effect of the acts of Colorado, its citizens, derivatives and residents, since the adjudication of *Kansas vs. Colorado*, has been to improve the quantity, flow and availability of water in the Arkansas River in the State of Kansas for all purposes and at all places whatsoever.

(k) Denies all the allegations of paragraph "k" except as hereinafter expressly admitted. Complainant admits the organization and existence of The Finney County Water Users' Association, but denies that it has or owns an appropriation of water to the extent of 250 cubic feet per second, or any appropriation whatsoever. Denies that its claims or use date from 1880, but admits that it has, since about 1885, operated with somewhat varying continuity, through itself or its predecessors in interest, an irrigation canal, capable of carrying a maximum of about 150 cubic feet of water per second, and that it has, since said date, irregularly and discontinuously, irrigated lands to the extent of about 10,000 acres. Admits that the two suits alleged were filed by said Finney County Water Users' Association and parties were named as defendants therein as stated; admits that the defendants in the first suit mentioned have, since long prior to the adjudication of *Kansas vs. Colorado*, been appropriators and users of water from the Arkansas River in Colorado, and that their use of water has continued practically the same since long prior to 1905. Alleges that of the defendants named in the second suit, few of said defendants are actual users or diverters of water in the State of Colorado, and alleges that the total consumptive use of said defendants named in the second case is comparatively small.

Admits that all persons taking water within the State of Colorado as a general rule divert and use the same with the aid, authority and permission of the State of Colorado,

but denies that there has been, since the adjudication in the case of *Kansas vs. Colorado*, any material increase whatsoever in the quantity of water used or diverted in the State of Colorado or other alteration in the diversion and use of Colorado which would diminish or deleteriously affect the State of Kansas or any user of water, inhabitant or resident thereof, but alleges upon the contrary that, since said adjudication, the supply of water in said river in Kansas, the quantity thereof, and the conditions thereof, have been steadily improved by the use of water in Colorado and by the climatic conditions, the rise in the water table, the increase of percolation and the general improvement of the water supply consequent thereon.

(l) Denies all the allegations of paragraph "l" except that complainant admits that the State of Colorado, its residents and citizens, will continue the diversion and use of water for irrigation in Colorado, but denies that the same will be in any way increased or will in any respect injure or damage the State of Kansas or any resident, citizen or inhabitant thereof, and denies that the State of Colorado or its citizens or inhabitants as a whole threaten to, or will, or will be permitted to so increase or alter the use of water in Colorado as to injury or damage the State of Kansas, or any citizen, resident or claimant therein.

(m) Denies the allegations of paragraph "m".

II.

AS A FURTHER REPLY TO SAID PRAYER FOR AFFIRMATIVE RELIEF, the State of Colorado sets forth as follows:

On the 20th day of May, 1901, the State of Kansas in its sovereign capacity, and upon behalf of and representing its citizens and inhabitants, and all persons and corporations claiming the right to use the waters of the Arkansas

River in the State of Kansas, either as riparian owners or appropriators thereof for domestic, irrigation, manufacturing or other beneficial uses, and also in all the capacities known to the law, filed its certain bill of complaint in the Supreme Court of the United States against the State of Colorado as defendant, and thereafter and on the 17th day of August, 1903, filed its amended bill of complaint in said proceedings against said State of Colorado, and against certain other appropriators of water in Colorado.

In the said original and amended bill of complaint the said State of Kansas alleged that the State of Colorado and others were depriving and threatening to deprive the said State of Kansas and its inhabitants (including the predecessors of The Finney County Water Users' Association), of all the water theretofore accustomed to flow in the Arkansas River; and, in its said bill of complaint and in the evidence offered in support thereof, said State of Kansas claimed that formerly, in Kansas, the waters of the Arkansas River furnished a wholesome and ample supply for domestic purposes, for the watering of stock, for power for operating mills and factories, and for saturating and subirrigating the bottom lands back to the uplands on either side of the river, so that crops thereon were not only bounteous, but practically certain, and that in the western portion of the valley of said river, in Kansas, these waters were formerly appropriated and used for surface irrigation to supplement the scanty rainfall in that region; and also that, after the lands in the Arkansas Valley, in Kansas, had been settled and raised to a high state of cultivation (all the bottom lands in the valley being alleged to be riparian lands and directly affected by the presence and flow of the river), and after parts of the flow of the river had been used for manufacturing and building purposes, and after the riparian lands had been largely and extensively irrigated in the valley of the river in the western portion of Kansas, by

diversions made in Kansas, and after portions of the land so irrigated had been sold and conveyed, the State of Colorado, its citizens, inhabitants and others, began systematically appropriating and diverting the waters of the Arkansas River in the State of Colorado between Canon City and the Kansas state line, for the purpose of irrigating dry, barren, arid, non-riparian and non-saturated lands lying on either side of the river and often many miles therefrom; and that, by the year 1891, all the natural and normal waters and a large portion of the flood waters of said river were so appropriated and diverted and actually applied to these dry, barren, arid, non-riparian and non-saturated lands in the State of Colorado (said diversions increasing from year to year, as their means of diversion became more complete and perfect), that the average flow of the river became greatly and permanently diminished, and the normal flow of the river, exclusive of floods, wholly and permanently destroyed, the navigability of the river ruined, the power for manufacturing purposes greatly diminished, and the surface of the underflow lowered, and the water for the irrigation ditches in the western portion of Kansas entirely cut off. Said State of Kansas also alleged in said bill that the loss sustained by said state and its citizens had been great and incalculable; that the cheap water power had been destroyed, the productivity of the bottom lands diminished, and the irrigating ditches left dry and the lands uncultivated.

The said State of Colorado and others (being water users therein made parties defendant) by their several answers, and by the evidence offered in support thereof, claimed that the lands along said river in the State of Colorado were naturally arid and unproductive, and incapable of sustaining human life except by the diversion and application by irrigation of the waters of said river and its tributaries, and that the said State of Colorado, by its Constitution and laws, and the decisions of its courts, had declared that the

waters of said river and of all other streams within the State of Colorado were the property of the state, subject to appropriation by the citizens and inhabitants thereof for irrigation and other beneficial purposes, and that said state claimed the right to divert, and to continue to divert, the waters of said river to the extent necessary in the irrigation of the lands lying along said river in priority and paramount and superior to any right of the State of Kansas, or the citizens or inhabitants thereof.

On the 16th day of May, 1904, one Granville A. Richardson was duly appointed by said Supreme Court of the United States a commissioner to take and return the testimony in said cause, and thereafter said commissioner proceeded to take the testimony of the said State of Kansas, and of certain of the citizens and inhabitants thereof claiming rights to the use of the waters of the Arkansas River in priority to the State of Colorado; and there was included in said testimony evidence of use of water by and the appropriations claimed to have been made by the predecessors in interest in the ditch and structures now owned by the said The Finney Association and all other ditches mentioned in the "Separate Answer" of the State of Kansas herein, and of the deprivation of water for said ditches caused by the appropriations of the State of Colorado and others. And upon behalf of said State of Colorado and the citizens and inhabitants thereof, evidence was offered of the appropriations of the waters of said river made by the State of Colorado and others and of the amount of land irrigated thereby, and the influence of the use of said water as a part of the resources of the state, in the settlement, growth and development of the lands along said river in Colorado.

The testimony so offered by the respective parties was closed on June 16, 1905, and included the facts and conditions to that date and was duly returned to said Supreme Court by said commissioner. Thereafter and on the 13th

day of May, 1907, the said cause was determined by said Supreme Court, and it was then and there declared and held by said court that equality of right and equity between said State of Kansas and said State of Colorado forbade any interference with the then existing diversion and use of water for purposes of irrigation in Colorado, and that, to the extent that the waters of the Arkansas River had been diverted for beneficial purposes and used in the irrigation and reclamation of its arid lands, Colorado was within the reasonable exercise of its sovereignty, and that said State of Kansas, in its sovereign capacity and as representing its citizens and inhabitants, had not made out a case entitling it to a decree; and thereupon the said bill of complaint as against the said State of Colorado and others was dismissed, but without prejudice to the right of the State of Kansas to institute new proceedings when it should appear that, through a material increase in the depletion of the waters of said river by Colorado, its corporations or citizens, the substantial interests of Kansas were being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river.

The said finding and judgment of the said Supreme Court was intended to be, and was and is, as of the date of the closing of testimony therein, to wit, June, 1905, a final determination of the rights of the States of Kansas and Colorado, respectively, in and to the waters of the Arkansas River, and of the extent to which, within the respective territory of said states, the citizens and inhabitants thereof, respectively, may use the waters of said river for domestic, irrigation, manufacturing or other purposes; and was intended to be, and was and is, a final judgment and decree that the rights of the State of Colorado and others, as appropriators of the water of said river in Colorado, were and are superior, prior and paramount, and in effect the State of Colorado, its citizens, inhabitants and all diverters and

users of water for beneficial or useful purposes from the Arkansas River within the State of Colorado were thereby quieted in the use and enjoyment thereof against the claims made by the State of Kansas, or any citizen, resident or inhabitant thereof.

The State of Colorado further alleges that, although neither The Finney County Water Users' Association nor its predecessors in title or interest were parties by name to the proceedings instituted in the Supreme Court of the United States by the State of Kansas against the State of Colorado and others, nevertheless they were directly interested in the subject matter of the said proceedings, and well knew, at the time the said bill of complaint of the State of Kansas was filed, that, in and by the said bill of complaint, the said State of Kansas declared that it was acting in their behalf and as their representative, and was asserting as against the State of Colorado the same right now claimed by the said corporate defendant, The Finney County Association, in this suit or its attempted suits in the lower Federal Courts, and then and there, and at all times subsequent thereto, the said predecessors in title and in interest of The Finney Association consented to the said claim of representation by the State of Kansas, and acquiesced in, approved and adopted said proceeding as having been instituted and conducted for the common interest of the various persons and corporations claiming rights in and to the waters of the Arkansas River in the State of Kansas, including the predecessors in title and interest of The Finney Association, and including the rights now claimed by said Association. At all times during the progress of the said litigation between the State of Kansas and the State of Colorado, the said predecessors in title and in interest of the said Association stood by and aided the State of Kansas in the prosecution of the said action, hoping and believing that the said State of Kansas would be successful in said proceeding, and that thereby the waters of the Arkansas

River now claimed by the said Association would be secured for it in said proceeding, and awaited the outcome of the said action with the intent and purpose of claiming the benefit thereof as against the State of Colorado.

The State of Colorado further alleges that the flow of water to which the State of Kansas now asserts a right is the same flow of water, and not other or greater, than that decreed by the Supreme Court of the United States in the action aforesaid, to belong to the State of Colorado, and to be lawfully subject to distribution in the said State of Colorado, according to its laws, to the State of Colorado and others, and that the State of Kansas is now asserting and complaining of matters, interests and events all of which were asserted and complained of by it in said original proceeding and then and there were considered adjudicated and were determined against the State of Kansas and its citizens, residents and inhabitants.

Wherefore, the State of Colorado alleges that the claims of the State of Kansas, its citizens, residents and inhabitants and all users and diverters of water therein (including The Finney County Association) as against the State of Colorado and its citizens and inhabitants to the use of the waters of the Arkansas River have been fully and were finally and completely adjudicated and determined by said judgment and decree of the Supreme Court of the United States, and the same is a bar to the further prosecution of this action, except that this Honorable Court, if the aggregate consumptive use of water in Colorado has increased since the year 1965 without corresponding benefits to the State of Kansas, may consider whether such increase has yet carried the use in Colorado beyond the limitations equitably resting upon the State of Colorado as a sovereign state in the United States, in view of the respective needs and resources of the states as a whole and the benefits of this and other resources available to either state.

III

AS A FURTHER REPLY TO SAID PRAYER FOR AFFIRMATIVE RELIEF, the State of Colorado alleges:

The persons named in the "Separate Answer of the State of Kansas" herein as being defendants in the individual suits brought by The Finney County Water Users' Association altogether total less than one hundred and fifty actual users of water for beneficial purposes from the Arkansas River and its tributaries within the State of Colorado, and represent less than one-fourth of the users in the State of Colorado in quantity of water diverted from said river. The list contains many names which represent no use of or claim upon the river or its tributaries. There are, in the State of Colorado, more than four thousand decreed, duly adjudicated and recorded claims and many more than four thousand individual persons and corporations diverting water from the Arkansas River and its tributaries under lawful authority of the State of Colorado. Colorado is ready and willing to supply a list of the names of the said individuals appearing upon its official records, but because of the voluminous character of such list, does not at this time file the same as part of this pleading, or encumber the pleadings and records of this Court with the same. Colorado alleges that none of the said persons or corporations are necessary or proper parties to this cause; that if any should be made parties, all should be made parties, but respectfully represents, that, as all of the said rights are derivative from and would be bound by any adjudication or determination against the State of Colorado, it would unnecessarily encumber these proceedings to make any of them parties hereto, and that none can be selected on any partial basis, without inconvenience and improper emphasis in this cause, or in any manner that is just or lawful.

Wherefore, the State of Colorado prays that none of the additional parties suggested by the State of Kansas should be made parties defendant herein.

IV

AS A FURTHER REPLY TO SAID PRAYER FOR AFFIRMATIVE RELIEF, the State of Colorado sets forth as follows:

(a) On the first day of August, 1876, the State of Colorado was admitted into the Union, and thereby became and now is a sovereign state, entitled as such to possess and exercise within the boundaries of its own territory the full right of sovereignty in respect to the control and utilization of all of those internal natural resources upon which the existence, growth and prosperity of the state, and, in particular, the means of subsistence of its citizens and inhabitants, depend. Throughout the limits of said state the rainfall is so slight that the lands cannot be tilled and made to produce crops, as may be done in the State of Kansas and in the other states lying to the east of Colorado; and long prior to the admission of said State of Colorado, and during the existence of the Territory of Colorado, it was well known that, to make any of said lands fruitful and capable of human habitation, it was necessary to divert the waters of the natural streams and apply the same to the lands bordering said streams, and thus produce by artificial methods the conditions favorable to plant life which in other states were produced by rainfall. And it was also well known that the area thus capable of being made fertile and productive would, because of scarcity of water, be a very small proportion of the entire area of said state.

The members of the convention which framed the Constitution upon and by reference to which the State of Colorado was created, well knowing the climatic and physical conditions which distinguished the lands of said state from those of most of her sister-states, and the necessity of using the entire volume of the waters of the natural streams arising and flowing through the territory of said state, and in-

tending, as of right they were entitled to do, to declare the sovereign right of the said State of Colorado in said natural streams and the waters thereof, and the uses to which in the settlement and upbuilding of said state said waters should be devoted, by said instrument declared:

> "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.
>
> The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

By the proclamation of the President of the United States made on the first day of August, 1876, it was made known to all the world that the said State of Colorado was admitted into the Union upon the declarations contained in said Constitution, as the fundamental and underlying principles and policies of said state, which, upon behalf of the several states of the Union, were accepted as consistent with the natural, climatic, physical and economic conditions presented within the boundaries of said state; and said Constitution thereupon became notice to all the world that the said State of Colorado in her sovereign capacity claimed and appropriated all the water of the natural streams of said state as against all sister states and sovereignties, and the

citizens and inhabitants thereof, and devoted said waters to those uses which would conserve and advance the general welfare of said State of Colorado, its citizens and inhabitants.

Upon the admission of said State of Colorado, the said State of Kansas and the citizens and inhabitants thereof, well knew, and at all times since and until the bringing of this action have known, that the said State of Colorado claimed and exercised full and exclusive administration and control of all the waters of the natural streams while flowing through said state, and that, as to those streams flowing into the State of Kansas, the said State of Colorado, its citizens and inhabitants, claimed and exercised the paramount and exclusive right thereto, and that the said State of Colorado by its laws and the decisions of its courts provided for the regulation, control and distribution of the waters of said natural streams in the reclamation and irrigation of its lands and other beneficial uses.

Prior to the admission of said State of Colorado it was well known that the climatic, physical and economic conditions presented within the limits of the State of Kansas were entirely different from those presented within the State of Colorado (there being at all times throughout said State of Kansas sufficient rainfall for the growing of crops, except that in the extreme western portion of said state crops may suffer during occasional years of drought), and, in view of and with reference to such conditions, the Constitution, laws and decisions of the courts of the State of Kansas assert no public or common right in the waters of the natural streams of said state, but affirm the right of the riparian owners to the use of said waters, as said right prevails at common law where the irrigation of lands is not a fundamental necessity; and, by the decisions of its court of last resort construing the laws of said state in respect to the use of said waters, it denies the application to said state of the principles and

doctrines established in Colorado, as they are hereinbefore set forth.

At all times since the adoption of the Constitution of Colorado the said state, by its laws and judicial decisions, and by the action of its executive departments, has, because of its relatively paramount necessities, claimed and exercised the right to the use of all the waters of its natural streams adversely and to the exclusion of the several states into which said streams may flow, and to the exclusion of all persons claiming rights to water beyond the limits of said State of Colorado, and has been reluctant to recognize any appropriations or claims to water beyond said State of Colorado, or to concede the justice or sound public policy, state or national, of recognizing claimants of said natural streams in other states, where necessity was not so pressing. At the time of the appropriations made by the State of Colorado, the laws and policy of the said states were and have since been as above set forth, and the appropriations of the State of Colorado were made in the belief that the doctrines and principles of the State of Colorado in respect to the public ownership of the water of the natural streams within the state, and of the common right to appropriate and use the same in the irrigation of arid land, with the condition that in times of scarcity, priority of appropriation should give the better right, were local to the State of Colorado and did not extend to the State of Kansas, nor apply to any persons claiming or using water in said state, and that the said State of Kansas did not claim or intend that any riparian owners or users of water in said state should be entitled to assert or maintain any right to the use of said waters prior or adverse to the use by the State of Colorado of said waters while flowing in the State of Colorado. And the diversions of the Arkansas River in said State of Kansas were made in the belief and with the understanding that, subject only to the exercise of the right of eminent domain by the State of Kansas, the primary and exclusive right to

the use of the waters of said river within the State of Kansas belonged to the owners of lands riparian to said river, and that uses of the waters of said river within said state, whether by riparian owners or others, were subject to the paramount and exclusive right of the State of Colorado, its citizens and inhabitants, to use the waters of said river while flowing through said State of Colorado; and all persons using the waters of said river in Kansas have acquiesced in and adopted said view, and their action and the events of history and the policy of Kansas have all encouraged the State of Colorado in the belief that it was entitled to the paramount and exclusive right to the use of said waters as herein alleged. . . .

(b) As contrasted with the policy and attitude of the State of Colorado arising out of its necessities, its arid conditions and the fact that it faces the limitation of water supply within its borders as the dominating and controlling restriction upon the continued development of civilization within its borders, the attitude and policy of the State of Kansas exhibits a relative failure to rely or depend upon water supply from streams arising outside its boundaries and a recognition of the fact that the flow of the Arkansas River is and has been a relatively negligible factor in its economic prosperity, its growth and its civilization. Not only has the State of Kansas, as heretofore alleged, omitted from its Constitution, its statutes and the decisions of its tribunals any considerable emphasis upon special laws, institutions or devices for the employment of the waters of its flowing streams, but the history of its laws and agricultural development shows a continued lack of interest therein or reliance and dependence thereon. Its irrigation enterprises have seldom lived to maturity on account of lack of any prime reliance thereon for agricultural activities. Its farmers have failed to support the ditches and diversion enterprises with any consistency; they have all been subject to frequent financial

difficulties, re-organizations and other economic exigencies indicative of lack of interest therein and practically all its irrigation enterprises have at times been abandoned or reduced in operation during periods of slightly additional rainfall. The only subsisting enterprises of any importance designed for the diversion of stream flow from the Arkansas River in Kansas consist of a group of ditches, principally in Finney County, Kansas. This group consists of five ditches, known as The Amazon Canal, The South Side Ditch, The Great Eastern Canal, The Farmers' (sometimes called the Kansas or Kansas Farmers') Ditch and the Garden City Ditch. East of this group the rainfall is so considerable that irrigation is not economically practicable or desirable and while one or two enterprises were launched in the boom period between 1875 and 1895, no irrigation enterprises worthy of mention have survived during the last forty years. West of this group, through a space of about sixty miles between the Kansas-Colorado boundary and the Garden City section, the river flows through a stretch of land ill adapted to profitable agriculture and always thinly populated. From the earliest times the river had practically no surface flow during this stretch, the normal flow being absorbed in the sand and even considerable floods being dissipated and lost. One or two small ditches of comparatively minor dimensions were constructed in this stretch, mostly near the Colorado line, in the boom period above recited and one or two, after various years of abandonment and reconstruction, still survive. They have been recently revived by the increase in continuous flow brought about by the return waters now rapidly developing from long continued irrigation within the boundaries of Colorado. The Garden City group already mentioned, however, represents substantially the whole of the irrigation development within the State of Kansas which has survived the exigencies of lack of public support. The conduct and management of this group of ditches shows a failure to rely upon the principles and usages of irrigation in the

western states, an abandonment of any claims based upon such usages and doctrines and a course of conduct which reveals the comparative lack of need for irrigation by stream flow in Kansas, an acceptance of conditions arising therefrom and a failure to assert or rely upon the flow of water in the Arkansas River from the State of Colorado.

The Finney County Water Users' Association is the only considerable user or diverter of water from the Arkansas River in Kansas now asserting any complaints against the citizens or inhabitants of Colorado on account of use of the river in Colorado. No other user or claimant joins it in any complaint and neither it nor any other substantial user is in an equitable position to complain.

Whatever right the said defendant, The Finney County Water Users' Association, may have to the waters of the Arkansas River in the State of Kansas is founded upon and arises out of a compliance with the laws of Kansas, and the decisions of its courts in respect thereto. By the laws of Kansas and the decisions of its courts, the owners of lands along the Arkansas River in said state at all times since the creation of said state have had, and now have, the primary right to the flow of the waters thereof, and to the use thereof; and no right to the use of said water for irrigation or other purposes can be acquired by persons or corporations other than riparian owners, except by the grant of the riparian owners or the condemnation of such waters under the power of eminent domain.

By the statutes of Kansas (appearing as chapter 42 of the Revised Statutes of Kansas of 1923), corporations desiring to procure water for irrigation may condemn the right to take water from any stream in said state (same sec. 42-109; also *Clark vs. Allaman*, 71 Kansas 206) and proceedings for that purpose are authorized to be commenced in the District Court of the county in which said water is to be diverted;

and notice is required to be published in said county that all persons making claims for damages by reason of such diversion are required to appear, and thereupon, upon the ascertainment of the damages suffered and the payment of the same, the said corporation is entitled to divert said water.

By the statutes of Kansas appearing as section 42-3, 109, of the Revised Statutes of 1923, exclusive jurisdiction is conferred on the several District Courts of said state to ascertain and settle the several rights and priorities of persons interested either as carriers or as consumers of the water at any time appropriated, and said courts are authorized to appoint a bailiff to divide the water from any source of supply according to the rights and priorities of the ditches entitled to the same, and conformably to the order of the court.

Neither the said Finney Association nor its predecessors have ever acquired, by grant, purchase, condemnation or otherwise, any right to divert the waters of the Arkansas River into or through the Farmers Ditch (being the ditch of said Association) to the extent claimed, or to any extent whatever or for that or any other ditch.

On the 30th day of October, 1909, The Finney County Water Users' Association, claiming to be the owners of a certain ditch known as the "Farmers Ditch" (also called the "Kansas Farmers' Ditch" and "Kansas Ditch"), taking water from the Arkansas River at a point near the eastern boundary line of the County of Kearney in the State of Kansas, and acting in pursuance of said section 42-3, 109 of the Revised Statutes of 1923 hereinbefore referred to, commenced proceedings in the District Court of the County of Kearney to have ascertained and determined, in accordance with the laws of Kansas, the rights of all ditches and canals diverting water from the Arkansas River in Kansas; and by its complaint it prayed that all of the defendants

disclose and establish the nature of their claims to the waters of said river, and the owners of all the ditches in Kansas claiming and diverting the waters of said river were made parties thereto and were served with process.

In said proceeding, The United States Irrigation Company, a corporation incorporated under the laws of Kansas, and the then owner of the said Great Eastern Canal and the said Southside Ditch, was made a party defendant, and made answer to the said bill of complaint. Thereafter, another corporation, successor to the last named, the United States Irrigating Company, was incorporated under the laws of Wyoming, and become a party defendant in said proceeding, and made answer to the complaint, asserting ownership of said two ditches, in and by which it made no claim to the waters of said Arkansas River for said Great Eastern Canal or Southside Ditch, either by appropriation, purchase, grant, condemnation, or by any right other than by the alleged use of the waters of said river for more than fifteen years prior to the bringing of said action, during which time it was alleged that the said The United States Irrigating Company and its several grantors had used the waters of said river to the extent of 300 cubic feet per second through the said Great Eastern Canal, and to the extent of 180 cubic feet per second through the said Southside Ditch, adverse to any claim of right by the plaintiff in said proceeding; and it was further alleged that any pretended appropriation by means of the Farmers Ditch claimed by the Finney Association in said action had been abandoned.

The Finney County Water Users' Association, replying to the answer of the said The United States Irrigating Company, denied that The United States Irrigating Company, or its predecessors or grantors, had used either of the said ditches continuously for fifteen years, or that any diversion of the waters of said river adverse to the said Finney County

Water Users' Association had been made until less than two years prior to the bringing of said action; and further alleged that the canals and ditches through which the said The United States Irrigating Company claimed the right to divert water had been wholly abandoned and allowed to remain in disuse from a time soon after their construction until less than ten years prior to the bringing of said action, and that all right of said Great Eastern Canal and said Southside Ditch had been wholly lost and abandoned.

Thereafter, upon the petition of the said The United States Irrigating Company, the said company claiming to be a citizen of Wyoming, the proceedings were removed to the United States Circuit Court for the Western District of Kansas, in which court the said Finney County Water Users' Association thereupon filed its motion to remand said proceedings to the District Court of Kearney County. While said motion was pending, and for the purpose of preventing the ascertainment and settlement of the rights of the said several parties, and in particular the rights of the said The Finney Association, in accordance with the statutes of said State of Kansas in such case provided, and to avoid proof being made supporting the allegation of the said parties that the Farmers Ditch and also the Great Eastern Canal and Southside Ditch and other ditches had been abandoned and were not entitled to divert any of the waters of the Arkansas River, the several parties to said proceeding—to wit, The Finney County Water Users' Association (the owner of the Kansas or Farmers' Ditch), the Garden City Irrigation Association (the owners of the Garden City Ditch), the Kearney County Farmers' Irrigation Association (the owner of the Amazon Canal), and The United States Irrigating Company (the owner of the Great Eastern Canal and the Southside Ditch)—on May 16, 1911, entered into a certain stipulation for an interlocutory decree, and caused an interlocutory decree to be entered in said proceed-

ings. The said parties so stipulating were and are the only large users of waters in Kansas from the Arkansas River and their use comprises substantially the whole use of or demand for water in Kansas from said river. The stipulation so made was in substance as follows:

The appearance of the said Finney County Water Users' Association for the purpose of said stipulation and decree was declared to be special, and without prejudice to its right to renew its motion to remand said proceedings after the expiration of the time limited by said interlocutory decree; and it was thereupon also decreed as follows:

That said interlocutory decree should remain in force and effect only until that certain controversy pending in the United States Circuit Court for the District of Colorado entitled *The United States Irrigating Company vs. The Graham Ditch Company, et al.* (which is described in paragraph "Twelfth (a)" of the Bill of Complaint of the State of Colorado in this pending cause), should have been disposed of and adjudicated, and until such time, within five years thereafter, as The Finney County Water Users' Association should file with the clerk of said court its writing by which it should elect either that the said interlocutory decree should become permanent as between the parties specifically named, or should elect that said temporary decree should be terminated at the time of filing said written election, and that, if said Finney County Water Users' Association should elect that the provisions of said interlocutory decree should terminate, then that the said Association might immediately, at the time of filing its said election, call up for hearing and disposition its motions to remand the said cause of *The Finney County Water Users' Association against The United States Irrigating Company, et al.*, with the same force and effect as though the motions then on file in said court were presented prior to the entry

of the appearance of the said Finney County Water Users' Association for the purpose of said interlocutory decree; and that no acts or things done by any of the parties, during the pendency of said interlocutory decree, should in any wise prejudice the right of said Finney County Water Users' Association to press said motions to remand; and that, during the period prior to the time when the suit of *The United States Irrigating Company vs. The Graham Ditch Company* should be finally adjudicated, the water of said river, stated as being 1,050 feet, should, without any reference to any questions of priority of right between the parties, be distributed and rotated between the parties in the following proportions:

To the Amazon Canal	16/84
To the Southside Ditch	16/84
To the Great Eastern Canal	16/84
To the Farmers' Ditch	21/84
To the Garden City Ditch	8/84

and that, after the date of the final adjudication of said suit of *The United States Irrigating Company vs. The Graham Ditch Company*, subject, however, to the election of The Finney County Water Users' Association to terminate said interlocutory decree, the proportion of water distributed to each of said ditches should be as follows:

To the Amazon Canal	4/21
To the Southside Ditch	4/21
To the Great Eastern Canal	6/21
To the Farmers' Ditch	5/21
To the Garden City Ditch	2/21

and that, prior to the adjudication of said last-mentioned suit, the rotation of said water in acre-feet should be as follows:

To the Amazon Canal.....3,000
To the Southside Ditch.....3,000
To the Great Eastern Canal.....4,312½
(the latter amount to be used by The United States Irrigating Company either for storage in its reservoirs or for direct irrigation)
To the Farmers' Ditch.....3,937½
To the Garden City Ditch.....1,500.

and that, after the final adjudication of said last-mentioned suit, subject to the election of the said Finney County Water Users' Association to terminate said interlocutory decree, the distribution of water by rotation should be (in acre-feet):

The Amazon Ditch.....3,000
The Southside Ditch.....3,000
The Great Eastern Ditch.....4,500
(to be used by The United States Irrigating Company either for storage in its reservoirs or for direct irrigation)
The Farmers' Ditch.....3,750
The Garden City Ditch.....1,500

It was also stated in said decree that the provisions of said decree should extend to and embrace all the water of the Arkansas River to which any of the parties thereto were or might thereafter become entitled, and it was provided that nothing in said interlocutory decree should in any wise prejudice the rights of any of said parties thereto at any time in any litigation now pending between any of the parties concerning the subject-matter of said decree, should such litigation ensue upon the election of The Finney County Water Users' Association to terminate said interlocutory decree; and it was provided that the jurisdiction of the officer appointed by the court should extend over the subject-matter of said interlocutory decree and the enforcement thereof. The said interlocutory decree remained in full force and effect until it became permanent as hereinafter set forth.

Said stipulation, and said interlocutory decree entered in pursuance thereof, were collusively and fraudulently made and entered by the parties thereto for the purpose of preventing the ascertainment and determination by said District Court of the State of Kansas, as the court having exclusive jurisdiction to ascertain and determine the same, of the rights and priorities of the respective parties to said stipulation and decree to the water of said Arkansas River. Those rights and priorities, as said parties well knew, cannot effectively be ascertained and determined by any tribunal acting outside of the jurisdiction of said State of Kansas, and the details are known only in the immediate neighborhood and are inaccessible to the State of Colorado or any non-resident of Kansas. The parties thereby mutually prevented proof being made in the proper proceedings in said State of Kansas of the truth of the respective allegations of each other, that neither the said Farmers' Ditch and other ditches had ever obtained any rights or priorities to the water from said river, and that whatever rights and priorities had been obtained had been long previous thereto abandoned. The stipulation and arrangement had also the further inequitable and iniquitous purpose of suppressing by the combination and confederation of the parties thereto the facts concerning the alleged appropriation by the said Farmers' Ditch, and by their concerted silence to prevent The State of Colorado, its citizens and residents, from obtaining within the jurisdiction of Kansas the facts concerning the alleged appropriations of said Farmers' Ditch and the other ditches which are the principal users of waters in Kansas from the Arkansas River, and the abandonment thereof. All of which acts and doings were contrary to equity and good conscience, in fraud of the laws of the State of Kansas and in violation of the rules and principles of law entitling a citizen to relief or advantage of relief in any court.

Thereafter in the said case, then pending in the United States District Court for the District of Kansas, First Divi-

sion, the aforesaid motion to remand was by order sustained, but the complainant thereafter withdrew the said motion and consented to a revocation of said order, and a final and permanent decree was thereupon entered on or about April 8, 1912, by consent of the parties thereto, including The Finney County Water Users' Association; and in and by the said decree it was finally adjudged and decreed that the water of the said Arkansas River in Kansas as aforesaid shall be distributed and rotated as follows, without priority between the parties:

To the Amazon Ditch sixteen eighty-fourths (16/84);

To the South Side Ditch sixteen eighty-fourths (16/84);

To the Great Eastern Canal, twenty-three eighty-fourths (23/84);

To the Farmers' Ditch twenty-one eighty-fourths (21/84);

To the Garden City Ditch eight eighty-fourths (8/84); and the rotation of water in acre-feet was decreed to be in the amount as follows:

The Amazon Ditch three thousand (3,000) acre-feet;

The South Side Ditch three thousand (3,000) acre-feet;

The Great Eastern Ditch four thousand three hundred twelve and one-half (4,312½) acre-feet, to be used by The United States Irrigating Company either for storage in its reservoir or for direct irrigating;

The Farmers' Ditch, three thousand nine hundred thirty-seven and five-tenths (3,937.5 acre-feet);

The Garden City Ditch, one thousand five hundred (1,500) acre-feet.

It was also permanently adjudged and decreed in and by the said decree that the provisions of the decree shall extend to and embrace all of the waters of the Arkansas River to

which any of the parties to the said decree were then or might thereafter become entitled.

The said decree has been since its entry and is now in full force and effect, and the Finney Association has been and is now receiving water for its canal thereunder, and not by virtue of any priority claimed by it or adjudicated in its favor or in favor of its Farmers' Ditch and the other parties thereto have likewise abandoned and given up any claims to priority of use or any appropriation claims, doctrines or theories.

At the time of the entry of the interlocutory decree and also of the final decree aforementioned there was pending in the United States District Court for the District of Colorado on the equity side the suit of The United States Irrigating Company against certain defendants, who were considerable water right owners on the Arkansas River in Colorado (being the suit mentioned in paragraph twelve (a) of the plaintiff's complaint). The said suit was begun August 10, 1910. Thereafter, in the year 1916, the defendants and the plaintiff in the said suit of The United States Irrigating Company adjusted their controversies therein, as the State of Colorado is informed, by the device of a money payment by the private interests in Colorado to the private interests in Kansas, whereby the Kansas ditches agreed to abandon their claims against the defendants in Colorado or claims of water from them, and to dismiss said suit. The said suit was dismissed finally, in the month of May, 1916, with prejudice. The said adjustment was participated in by the defendants (who were individual corporations in Colorado) and by the plaintiff therein and also by the owners of the Amazon Canal, the South Side Ditch, the Great Eastern Ditch and the Garden City Ditch, all referred to in the final decree hereinbefore mentioned as having been entered in the United States District Court for the District of Kansas. The Finney Asso-

ciation did not affirmatively adopt and approve said dismissal as did all the other parties to said stipulations and decrees in the United States Court for Kansas but it has at all times accepted the benefits of said stipulations and decrees, adopted the same and received its water thereunder, thereby in effect and equity accepting the said dismissal and the consequences thereof.

By the aforementioned decree all said principal users of water in Kansas abandoned any priority which they or either may have had in and to the waters of the Arkansas River in the State of Kansas; and any and all right or claim which prior thereto each or all might have lawfully asserted by virtue of its priorities theretofore claimed, was and has since been waived; and all of their right to water has by virtue of the premises been divided with the other parties to the aforementioned Kansas decree, as therein recited, the said parties being the parties with whom the said Colorado defendants have made their adjustment, and by the foregoing facts recited The Finney Association and the others named have transferred and disposed of the alleged rights, if any they ever had, and are estopped from asserting any claims based upon priority, or earlier date, or the relative date of first user or upon seniority of construction, claim or enterprise and are estopped to assert any claims against the State of Colorado or the users and consumers of the waters of the Arkansas River in the State of Colorado. By said proceedings and decrees the irrigators of Kansas recognized and accepted the limitations on the flow of the Arkansas River then and now existing and showed they were content to abide thereby. The Kansas ditches and irrigation enterprises named above and which participated in said stipulations, decrees and said adjustment and abandonments of their alleged claims are not only the principal users of irrigation water from the Arkansas River in Kansas but are the only large users therein and represent

substantially the whole of the use and demand for water in Kansas. The Colorado ditches sued in said action, and who purchased immunity as alleged above and who purchased dismissal of said suit represent the largest users of water from the Arkansas River in Colorado and include the large enterprises most immediately and directly affected by any claims to water by the State of Kansas so far as quantity of use and geographical location is involved. Neither the State of Kansas nor the State of Colorado was a party to any of said proceedings or participated therein or in said money payment or dismissal.

(c) The effort and endeavor to make full use of the respective physical, climatic and geographical resources in the States of Kansas and Colorado are in great contrast. The rainfall in the Arkansas Valley in Colorado varies from about eleven inches per annum to nearly sixteen inches per annum precipitation, the latter figure being reached only for a short distance at the eastern margin of the state. The annual precipitation in the State of Kansas varies from a minimum of sixteen or seventeen inches to an annual amount far in excess of the normal requirement for the growth of the usual crops in the Mississippi Valley. Even in the extreme western counties of Kansas, where soils are adaptable at all to agriculture, the rainfall is sufficient in frequent years to raise crops without recourse to the expensive devices of irrigation.

The lands in Colorado irrigated by ditches and reservoirs are wholly dependent for their cultivation on the waters of the Arkansas River, withdrawn for that purpose; and but for such waters would be arid and sterile. There is no other source of water supply for said lands. The lands under the ditches in Kansas are situated in a more humid climate and require less water for their economical irrigation than those of Colorado; and, in addition, there are

sources of supply available for the irrigation of its said lands, and which are not available in Colorado:

The said lands in Kansas are underlaid with ground waters which are available for irrigation through the construction of wells, and the land can readily be supplied with water thereby, if and when the said lands may lack water from rainfall. In addition, the waters of the underflow of the Arkansas River in Kansas at and above the headgates would furnish a large source of supply for the ditches and lands thereunder. Of neither of these sources, however, have the citizens of Kansas availed themselves to any adequate degree.

The appropriators of water from the Arkansas River in Colorado and their predecessors have spent many millions of dollars in developing and conserving their only source of supply, and in connection therewith have constructed large and expensive reservoirs which conserve the flood waters which would otherwise go to waste. By their care and expenditures, as aforesaid, and by economy in the use of the waters, they have brought their properties to their present state and condition of value. The State of Kansas, however, has done little to avail itself of the natural resources which at all times have existed and now exist in the State of Kansas, and which are and have been available for the irrigation of lands; otherwise the said lands would at no time lack water, if they at any time do lack water. The residents of the Arkansas Valley in Kansas have made no reasonable attempt to use the underflow of the river available at their headgates. They have made no reasonable attempt to conserve the underground waters obtainable by wells. They have stood by without protest and have permitted and now permit other and later claimants to water in Kansas to take water from, or tributary to or contributing to the flow of, the Arkansas River in Kansas which would otherwise be available.

At no time has the State of Kansas or its citizens sought to take or conserve any of the waters of the Arkansas River in Kansas by constructing reservoirs or storage facilities for the supply of the lands. There are now, and always have been, and will be in the future, at periods of the year, waters, and particularly flood waters, in the Arkansas River in Kansas which can be and could have been practically and economically conserved by storage in reservoirs in quantities sufficient to supply all of the needs which the State of Kansas or its citizens has or has had or may have in the future. There are now and always have been reservoir sites in the State of Kansas procurable for the storage of such waters, and at no great or disproportionate expense, or expense greater than that customarily incurred in the State of Colorado by appropriators in conserving the waters of the Arkansas River and preventing waste. Nevertheless the State of Kansas has allowed these waters in the State of Kansas to pass down the channel of the Arkansas River without use and to escape to the lower reaches of the river where irrigation is not practiced, and has allowed them to go to waste, whereas if it had expended or would expend time and effort and money in reasonable amounts, as Colorado has done, and with a desire to conserve and economically use the said waters and to protect and develop the natural resources within the State of Kansas, the said waters could have been and would be now and would in the future be available and sufficient for all of the demands of the state. The state, however, allows this waste to continue and takes and has taken no steps to prevent it, or to use the said unused natural resources of the Arkansas River. Only one reservoir, of inconsiderable capacity and never adequately or scientifically employed, now exists or has ever been constructed in Kansas.

The users of water in Colorado have never taken and do not now take all of the normal flow or all of the flood

waters of the Arkansas River on its course through the State of Colorado, and there are frequently times when the waters passing from Colorado into Kansas are of immense volume. Annually, the flow of water from Colorado alone into Kansas in the Arkansas River is more than sufficient, if properly taken and conserved in Kansas, to supply all of the irrigation demands of the Kansas claimants of water for irrigation.

The prayer of Kansas, even if it were just and well grounded, cannot be granted without the practical destruction of the greater part of the irrigation enterprises in Colorado, the return to aridity in Colorado of many times the acreage lying under Kansas ditches or susceptible of irrigation in Kansas from the Arkansas River, the waste of great quantities of water in transportation over arid stretches and enormous waste in other ways.

The water users of Kansas and the irrigators under its ditches are unthrifty and uneconomical in the use of water which is diverted into the ditches. They divert into the said ditches water which comes from the State of Colorado and also water coming from sources in Kansas and to which the State of Colorado has no access. The appropriators in Colorado, by careful and scientific use of the waters which they divert and conserve, have developed their lands. Nevertheless the appropriators of water in the Arkansas River drainage in Colorado take and receive, and for a long time past have taken and received from the said river and its tributaries, for irrigation, less water per acre than is taken and has in the past been taken and received from the said river in Kansas by the irrigation claimants in Kansas for their irrigated lands.

The entire irrigated area in the State of Colorado exceeds three million, three hundred thousand acres, and the lands irrigated in Colorado from the waters of the Arkansas

River about five hundred thousand acres, and the entire irrigated acreage in the State of Kansas does not exceed ninety thousand acres, and the lands in Kansas irrigated from the Arkansas River only about sixty-five thousand acres at most. There are many natural streams in Kansas from which water can be diverted for irrigation in Kansas and which are not available to Colorado appropriators; and by no act or deed charged in the complaint, or at all, has the State of Colorado or its citizens caused or contributed to any injury to the substantial interests of the State of Kansas or its citizens, or to the benefits to which they are entitled, nor has there been any such injury.

(d) The practice of irrigation in Colorado is steadily developing and improving the supply of water available on the lower stretches of the Arkansas River not only within the State of Colorado, but also across the Colorado-Kansas boundary. Continuous irrigation on the upper stretches of any stream such as the Arkansas River tends to raise the level of the ground waters in the drainage basin affected, to reduce the so-called duty of water, viz., the quantity of water required for the successful cultivation of a given area of land, to stabilize and increase the flow of water in the periods of minimum flow which occur in all prairie and mountain streams, to facilitate the carriage of both minimum and flood flows by keeping the sandy beds of the prairie streams moistened so that the flow is not lost by percolation and evaporation in the warm sand and in other respects to augment the economic availability of the water flow. As a general rule the development of irrigation first and most intensively on the upper stretches of western streams best accords with sound public policy, as such development permits the use of the water before it is subject to loss by percolation and evaporation through dry and arid stretches, permits the accumulation and return of percolating waters, which can be used over again repeatedly in the lower

stretches of the stream, and in other respects conserves the water supply and produces the maximum public benefit therefrom. These general statements, observable and recorded throughout the arid West, are all true both in theory and practice on the Arkansas River. Large quantities of water are now available on the Arkansas River in its lower stretches both in Colorado and in Kansas which originate in the return flow and percolation from water diverted above and applied through a long period of years upon lands bordering the river. A considerable quantity now used for irrigation in Colorado consists of these return waters, already once or more times employed for the cultivation of crops. Between the mountains and the Colorado-Kansas boundary numerous permanent streams have originated in the former dry channels which now contribute continually to the supply and flow of the river. These not only add to the total quantity of available water, and also add to the minimum flow during the critical spring and late summer months when the snow of the mountains is not melting, but tend to moisten and saturate the river bed so that the flood and maximum flow arising from melting snow in the early summer and from heavy precipitation during the late summer and fall months is carried with less loss, nearer the surface, for greater distances and in larger quantities. The amount and the beneficial consequences of this return flow have steadily increased in Colorado, most appreciably since the year 1900, and will undoubtedly augment in the future. Vast areas of former arid land along the Arkansas River in Colorado have by cultivation and irrigation become so saturated as to require drainage and have now been drained by artificial methods and these drainage channels carry and will continue to carry great quantities of water annually to the main river. The saturation has, moreover, steadily reduced the quantity of water originally required for irrigating a given acreage. The storage of water in the large reservoir systems of Colorado has a similar effect in the way of saturating the land

and contributing to return flows. As a consequence of these and other irrigation conditions in Colorado, there has developed at the Kansas-Colorado boundary a material and increasing normal flow which not only is supplying water for irrigation in Kansas heretofore unavailable, but keeps the naturally dry and losing stretch of river at the western margin of Kansas in a state to transport with less loss both the minimum and maximum flow of the river.

The Arkansas River, for many miles near the eastern boundary of Colorado and the western boundary of Kansas, has flowed through a broad, sandy bed which is affected by peculiar climatic and geological conditions and which has, until recent years, absorbed or destroyed not only the minimum flow of the river but even considerable floods. The attempted carriage of water across this stretch would be, in spite of improving conditions, exceedingly wasteful and uneconomical, and delivery of any given quantity of flow to a point east of the arid stretch, viz., in the neighborhood of the irrigation enterprises in the section of Garden City, would require, even under the present improved conditions, the surrender of a much larger quantity of flow by the ditches in Colorado, the practical cessation of irrigation in Colorado during some periods of the year and the destruction and abandonment of many irrigation enterprises in Colorado, even if practicable at all.

The State of Kansas is, as a whole, more prosperous than Colorado. Its agricultural resources are much more varied and the western counties, even those bordering the Arkansas River, have shown a gain in wealth and prosperity comparable with the remainder of the state. On the other hand, the Arkansas Valley in Colorado, being dependent, as it is, entirely upon agriculture based upon irrigation and resorting as it does to the most intensive and scientific use of irrigation, has revealed definite limitations to its development, has grown in wealth and prosperity much less markedly

than the Arkansas Valley in Kansas and has much less capability of definite expansion and improvement. Only through the slow processes, with the utmost public co-operation and the continued and undisturbed employment of its water resources can it continue to maintain even the present level of civilization and prosperity.

(e) The present development of agriculture in the Arkansas Valley has been based upon a public reliance and faith in its irrigation resources and institutions.

At all times since the organization of the then territory of Colorado, now the State of Colorado, in the year A. D. 1861, and from the earliest settlements within the territory now comprising the State of Colorado, the doctrine of the riparian right to the use of water has been and still is repudiated and denied in said territory and state, and the doctrine of the appropriation of water for irrigation and other beneficial purposes has applied, and been in force, priority of appropriation in point of time thereby giving the better right. In and by the Constitution of the State of Colorado adopted in the year 1876, the State of Colorado has claimed and declared that the water of every natural stream not theretofore appropriated within the State of Colorado belonged to the public, and was and is dedicated to the use of the people of the State of Colorado; and ever since said year the laws of the State of Colorado have provided for the appropriation of waters of the natural streams of said state by the people of the state, and within the state, to the exclusion of the right to the use of water by the people of any other state. The Legislatures of Colorado in the years 1879 and 1881 divided the state into irrigation districts, and provided a system for ascertaining, through appropriate court proceedings in the Colorado state courts, the various appropriations of water made in each of the irrigation districts of said state, to the end that the various appropriations so made should become a matter of record; and provided a system of water officials,

who, as executive officers of the state, should be and are charged with the duty of distributing the waters of the natural streams of the State of Colorado among the various appropriators of water within the said state, according to the amounts and dates of their several appropriations, as so fixed and determined by the courts of the said state.

The land situated in the Arkansas River drainage basin within the State of Colorado is dry, barren and unproductive, in its natural state, but is very fertile when cultivated by irrigation. Prior to the year 1860, ditches had been constructed and appropriations made, and the water applied to the beneficial uses of irrigating lands, in many localities on the Arkansas River and its tributaries in Colorado; and from the year 1860 the number of appropriations made, and the extent thereof, were steadily increased until about the year 1880, by which time a large proportion of the normal flow of said river, and its tributaries, was actually diverted and applied to the irrigation of the lands of the various appropriators in Colorado. From the year 1880, other canals and ditches were constructed, and appropriations made, in Colorado, of the waters of said river and its tributaries, and the water was thereby diverted and applied to the irrigation of lands under the respective ditches; all of which was done in good faith, under the belief that the State of Colorado and the people thereof were entitled rightfully and lawfully to appropriate and use all the waters of the streams of the state for irrigation purposes; and they have, ever since their respective appropriations, continued each and every year to divert the waters of said streams and use the same for irrigation purposes, and in so doing have provided permanent homes for many thousands of people, many of them coming from the State of Kansas, and purchasing and settling upon irrigated lands in the Arkansas Valley in the State of Colorado, and continuing to make their homes thereon down to the present time.

The counties in the State of Colorado whose prosperity depends largely upon the cultivation of the soil by irrigation from the Arkansas River and its tributaries are the counties of Lake, Chaffee, Custer, Fremont, Pueblo, El Paso, Huerfano, Otero, Crowley, Las Animas, Prowers and Bent, all situate in the Arkansas River Valley in said state; and as a result of the construction of said canals and ditches, and the diversion of water from said river and its tributaries, many populous towns and rural communities have been built up at a cost and outlay of many millions of dollars; and each and all of said communities have been and are prosperous as a result of the appropriation and use of the waters of said river and its tributaries, for irrigating the lands.

Beginning with the year 1899, the citizens of Colorado and others began to build sugar factories for the manufacture of sugar from sugar beets, the factories being located in various towns in said valley in Colorado, and the sugar beets being grown upon the irrigated lands of said valley; between the years 1899 and 1905, six sugar factories were built, having an aggregate capacity of about five thousand tons of beets per day, and at a cost of more than $5,000,000; and, in the necessary providing of equipment, tools and appliances for growing and harvesting the sugar beets, there has been expended and invested a large sum in addition to the cost of the factories, to wit: a sum greatly in excess of $1,000,0000. The business or industry of growing sugar beets on said irrigated lands and manufacturing sugar therefrom is one of the permanent and profitable industries of the State of Colorado, in which many millions of dollars are permanently invested.

Another permanent industry, in the matter of irrigating and farming of said lands, is that of growing alfalfa, there being in the Arkansas Valley in Colorado more than one hundred thousand acres in alfalfa, which produces three or

more crops of hay per year; and in connection with the growing of alfalfa, and the sugar beet industry, there has likewise grown up and has been established the industry of stock raising, in which many people are engaged and a vast amount of capital invested. It has also been demonstrated that the soil in the Arkansas Valley in Colorado and the climate of the said state are very favorable for the growing of fruits, berries, vines of all kinds and cantaloupes, and vast areas of said territory are planted with fruit trees and shrubbery, and vast areas used each and every year in the growing of garden truck, vegetables, seed crops, grain, corn and other like farm products, and in which industry many millions more of money have been permanently invested. The amount of lands so placed in cultivation in the Arkansas River Valley in the State of Colorado and irrigated from canals and ditches taking their water from said river and its tributaries, is more than 500,000 acres, and the cost of constructing said canals and ditches has exceeded $20,000,000.

The value of all said lands so placed under irrigation and in cultivation in the Arkansas Valley in the State of Colorado did not exceed, in the year 1881, $1,000,000, whereas about the year 1895 the value thereof, exclusive of the value of said canals and ditches, was more than $11,000,000; and at the time of the filing of the bill of complaint herein the value of all said lands, together with the improvements thereon, but exclusive of said canals and ditches, amounted to more than $100,000,000. All said investments were made and said values obtained by means of the diversion of the waters of said river and its tributaries for irrigation purposes, and by means of the labor and investment of the owners of said land, and upon the belief and understanding that said appropriations of water were rightfully and lawfully made, and said appropriators and users of the water for irrigation in the State of Colorado would continue

to have the right of enjoying the use of said waters of the Arkansas River and its tributaries for irrigating their various farms and tracts of land, free from any rights or claims of anyone making claims upon the waters of said Arkansas River out of the State of Colorado.

In the counties above named, that are located within the Arkansas River Valley in the State of Colorado, there are more than twenty cities and towns, and many villages, all of which are either chiefly or entirely dependent for their continued existence and prosperity upon the agricultural interests of said valley. Said cities, towns and villages, exclusive of the city of Pueblo, have a population of approximately 100,000 inhabitants; and the said city of Pueblo, which has itself a population of more than 50,000, is likewise largely dependent upon the agricultural interests of the valley for its maintenance and prosperity. Scores of school houses, churches and charitable institutions and factories of many kinds have been established and built and are being maintained in the agricultural communities in the irrigated district in said Arkansas River Valley in Colorado as the direct result of the irrigation of said lands and the settling up thereof, and these are likewise wholly dependent upon the continued irrigation of said lands, not only for their continued usefulness, but for their very existence. More than one hundred miles of special railroads have been built through said irrigated districts in the Arkansas Valley in Colorado, and as a direct result of the irrigation of the lands, that are dependent entirely upon the continued irrigation of the lands for the continued operation of said railroads. These special railroads so built are outside of and in addition to the main trunk lines of railroad located in said Arkansas Valley, which total more than five hundred miles and are dependent upon continuation and development of irrigation for a great part of their freight and passenger traffic.

All of the cities, towns and villages above mentioned and

referred to, exclusive of the city of Pueblo, that are situated in said Arkansas River Valley in the State of Colorado and that are dependent on the irrigation of said lands, amounted in the aggregate in the year 1881 to approximately 5,000 in population, and there has been a steady and rapid growth and increase in population ever since said year, due almost entirely to the development of the irrigated lands within said territory, the population having increased in the year 1895 to approximately 25,000 and to about 100,000 at the time of the filing of the bill of complaint herein. In the year 1881, the value of all the taxable property in the counties of Prowers, Fremont, Pueblo and Bent (which latter county then embraced the territory now constituting the County of Otero) amounted approximately to $8,500,000; while, by the year 1895, the taxable property in said counties, including the property in the County of Otero (which in the meantime had been created and formed out of a portion of the County of Bent), amounted to approximately $29,000,000; and by the time of the filing of the bill of complaint herein it had increased to approximately $75,000,000; and said values were obtained largely upon the irrigation of lands within said counties, and said increase in value was the direct result of the diversion of the waters from said Arkansas River and its tributaries, and the irrigation of the lands in said counties, as hereinbefore set forth.

In addition to the cities, towns and villages so located in and dependent upon the irrigation of the lands in said Arkansas River Valley in Colorado, there are approximately 50,000 inhabitants located outside of said cities, towns and villages, and upon the lands under irrigation and in cultivation in said Arkansas River Valley in the State of Colorado, and whose property investments and livelihood are absolutely dependent upon the continued use of the waters of said Arkansas River, and its tributaries, for irrigating their respective tracts of land for the purpose of growing crops

thereon, in the same manner as has heretofore been practiced by them, and without future hindrance or denial of said right to divert the water and to use the same for irrigating their said lands. Their supply of domestic water is also obtained largely from said Arkansas River.

Of the population of both of said towns and country, more than one-half is located under or adjacent to canals and irrigating systems deriving water from the Arkansas River in Colorado; and of the taxable property values hereinbefore alleged, approximately one-half thereof is located under or adjacent to said canals and irrigating systems in the State of Colorado; and said communities have been built up, and the population of the various cities, towns and villages and rural communities have been established and built up, and the growth in population and the increase in value of the taxable property, as hereinbefore set forth, have been due to the building of its respective canals and irrigation systems within the State of Colorado herein, and due to continued operation of its irrigation systems, and the diversion of the waters of said Arkansas River and its tributaries for the supplying of water for the irrigation of the lands lying under and adjacent to its canals. The future maintenance of the population in said communities, respectively, is dependent almost entirely upon the right of the State of Colorado, its citizens and inhabitants, to continue so to divert the waters of said Arkansas River and its tributaries without let or hindrance from anyone claiming the right to the use of the waters of the Arkansas River outside of the State of Colorado.

The construction of the canals, ditches and irrigating systems of the State of Colorado has been made openly and notoriously upon the faith of the claim made and asserted by the State of Colorado and its citizens that the waters of the natural streams of said state were subject to exclusive appropriation and use within the State of Colorado, all of

which was known to the predecessors in title and interest of the Finney Association herein, and to all other users and diverters of the waters of the Arkansas River in the State of Kansas, and with their acquiescence and silence, and their failure in any manner or at any time prior to their establishment to protest or to make any claim to, or to assert any right or interest in, the waters of said river as against existing appropriators, or those who should thereafter appropriate the waters of said river within the State of Colorado. Said cities, towns, villages and rural communities have been built up and populated, and the beet-sugar industry, fruit-growing, alfalfa-raising, garden-trucking, stock-feeding and other industries established, developed and placed upon a substantial and profitable basis, likewise openly and notoriously, and with the knowledge and acquiescence upon the part of said users in Kansas and the predecessors in title and interest to them, and of all diverters of waters from the Arkansas River in the State of Kansas, and without their having made any claim of right to the use of the waters of said river, or any part thereof, as against any existing or future appropriators of water from said stream in the State of Colorado, until the bringing of the litigation known as *Kansas vs. Colorado* in this Supreme Court. All of the growth and development in Colorado, as aforementioned, depended upon, and still depends upon, the exclusive use in Colorado of the waters of the Arkansas River as against all claimants beyond the said state, and such exclusive use has been practiced at all times heretofore. If the State of Colorado were now compelled to turn down the channel of the Arkansas River, for the use of any persons in Kansas, the whole or any part of the water demanded by the State of Kansas, the remaining flow of water in the Arkansas River in Colorado would be insufficient for the needs of the State of Colorado, and for the farms, towns, cities, industries, investments and population as aforementioned; and the prosperity of the Arkansas Valley in Colorado, and the

investment of the State of Colorado, would be destroyed, and the said valley would revert to its original arid and desert condition.

(f) The present exercise of the sovereignty of the State of Colorado in the diversion and use of water for agricultural, domestic and other beneficial purposes within the State of Colorado does not exceed the just limitations upon that sovereignty nor infringe the balance of equities between the State of Kansas and the State of Colorado, nor exceed any just or lawful limitations or restrictions upon the power and activity of the State of Colorado, its citizens, inhabitants and derivatives.

WHEREFORE, the State of Colorado prays that this Court may find and determine that the State of Kansas, in behalf of itself, its citizens, inhabitants and residents, has no just complaint against the State of Colorado or its citizens, inhabitants or residents on account of the matters at issue herein; that the State of Colorado and its citizens, inhabitants and derivatives may be quieted in their diversion, use and employment of the waters of the Arkansas River and its tributaries; that that part of the "Separate Answer of the State of Kansas" praying affirmative relief may be dismissed and that the prayer for relief in the original complaint herein made by the State of Colorado may be granted with costs.

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